United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

Original

74-2480

BRIEF FOR PETITIONERS

B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-2480

The City of Groton; Borough of Jewett City; Second Taxing District; City of Norwalk, Third Taxing District; City of Norwalk, City of Norwich; Town of Wallingford, and the Connecticut Municipal Gas and Electric Association,

Petitioner,

v.

Federal Power Commission,

Respondent,

Connecticut Light & Power Co.,

Intervenor.

On Petition To Review Orders
Of The Federal Power Commission

Charles F. Wheatley, Jr.
Grace Powers Monaco
John A. Cameron, Jr.
Wheatley & Miller
2600 Virginia Avenue, N.W.
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Washington, D. C. 20037

December 13, 1974

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IN THE
UNITED STATES COURT OF APPEALS
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The City of Groton; Borough of Jewett City; Second Taxing District; City of Norwalk, Third Taxing District; City of Norwalk, City of Norwich; Town of Wallingford, and the Connecticut Municipal Gas and Electric Association,	:	
Petitioner,	:	
v.	:	No. 74-2480
Federal Power Commission,	:	
Respondent,	:	
Connecticut Light & Power Co.,	:	
Intervenor.	:	

BRIEF FOR PETITIONERS

STATEMENT OF THE ISSUES

1. Whether the Commission erred in refusing to reject CL&P's fuel clause, both as initially proposed and as substituted, which patently failed to conform to the requirements of Sections 35.13 and 35.14 of the Commission's Regulations and thus should have been rejected pursuant to Section 35.5 of the Regulations.

2. Whether the statements and actions of the Commission and its members establish that this agency has devised a new policy on rate change suspensions, for which no justification has been presented in the form of findings and reasons, which ignores the Congressional mandate inherent in its grant of suspension authority, necessitating review by this Court.

3. Whether the error apparent on the face of the Commission's August 30, 1974 Order which grossly understated the rate of return which CL&P had requested necessitates review by this Court.

REFERENCE TO ORDERS BELOW

The case is presently before the Court on appeal from orders issued by the Federal Power Commission on August 30, 1974 (Joint Appendix, pp.40-43), September 27, 1974 (JA, pp. 79-82), November 8, 1974 (JA, pp. 106-110), and November 29, 1974 (JA, pp. 112-117) in Docket No. E-8952, wherein the Commission refused to reject a new rate filing and fuel clause by the Connecticut Light & Power Company and suspended it only for one day.

On December 3, 1974, this Court ordered the case set down for expedited hearing on the merits in lieu of a stay and denied a motion by the Federal Power Commission to dismiss the appeal for lack of jurisdiction without prejudice.

STATEMENT OF THE CASE

Petitioners herein are the six Connecticut, consumer-owned electric utility systems, ("Municipals") each of which purchase all or a portion of their electric power and wholesale from the Connecticut Light & Power Company ("CL&P").

CL&P is the largest electric utility company in the state of Connecticut and it, along with the Hartford Electric Light Company, Western Massachusetts Electric Company and the Holyoke Water Power Company, is a wholly-owned affiliate of Northeast Utilities, a public utility holding company.

Since 1964, CL&P's sales at wholesale of electric energy to Petitioners have been subject to regulation by the

Federal Power Commission ("Commission", or "FPC"), pursuant to the provisions of the Federal Power Act, 16 U.S.C. 824 et seq.

In June of 1972, CI&P filed with the Commission a completely new wholesale rate designated R-1 (Docket E-7743) which substantially altered the prior rate both at the level of rates and form. The R-1 rate drastically affected the method of operation of the Municipals and restricted their ability to compete with CL&P. Following a petition to intervene by the Petitioners, the Commission suspended the R-1 rate for the full five-month period allowable under Section 205 (e) of the Federal Power Act, 16 U.S.C. 824d(e). Following a comprehensive hearing on the rate, an initial decision was rendered on July 29, 1974, by Administrative Law Judge Lande, which adopted substantially all of the arguments raised by the Intervenors and the Commission Staff against the reasonableness of the R-1 rate structure and level of rate. Judge Lande rejected the Company's new rate form as unduly restrictive (JA, pp. 1-25). The Commission has not yet issued a decision affirming or modifying the Initial Decision.

On August 2, 1974, CL&P submitted its proposed R-2 rate (Docket E-8952) which is the subject of this appeal (JA, p. 26). The R-2 rate represented a second, completely new, drastically changed rate form, coupled with a rate in-

crease over the level of the filed R-1 rate. While different in format, the rate form contained the same basic anticompetitive restrictive features found in the R-1 rate, which Presiding Judge Lande had rejected in his Initial Decision.

The six Connecticut Municipals petitioned to intervene in opposition (JA, pp. 27-39) on the ground that (1) the proposed new R-2 fuel clause was illegal and contrary to Commission precedent and should be rejected along with the rate; (2) R-2 rate level was excessive and unjustified; and (3) the rate design would perpetuate the abuses found in the R-1 rate, including a new of anticompetitive elements which would jeopardize the continued viability of Petitioners, each of which compete with CL&P at the retail level for industrial customers. Because of the drastic impact of the new R-2 rate form, the Municipals requested that the rate be rejected or in the alternative, the Commission undertake an immediate hearing on the matter to be completed within the five-month suspension period. Included in the petition to intervene was a detailed account of the irreparable injury that would accrue to Petitioners if suspension were not ordered.

On August 30, 1974, the Commission issued an order (JA, pp. 40-43), which specifically found that the fuel adjustment component of the rate was not in conformity with its precedents because the clause imputes the Company's own

fuel cost variations to energy it purchases from other utilities, but refused to reject the rate and suspended it for an indefinite time:

> We note that CL&P's proposed fuel adjustment clause imputes the Company's own fuel cost variations to its purchased energy, and this is subject to suspension since it may result in rates that are not just and reasonable. Accordingly, we shall provide for the filing of a fuel adjustment clause which conforms to Opinion No. 633. The suspension of the fuel clause will be lifted upon receipt of a filing in satisfactory compliance of Opinion No. 633. (JA, p. 41; emphasis added).

The Commission made a plain error in stating that the proposed increase would result "in a realized rate of return of 5.61%." As to the other objections by the Municipals, the Commission conceded that the R-2 rate had "not been shown to be just and reasonable," but refused to reject it, and accepted it for filing and suspended it for only one day:

> Our review of CL&'s filing and the issues raised therein indicates that the proposed changes have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory, preferential, or otherwise unlawful. Accoridingly, we will suspend the proposed changes for one day and establish hearing procedures to determine the justness and reasonableness of CL&P's filing. (JA, p. 41).

Thus, the Commission's order of August 30 by its terms suspended two interrelated and interdependent component

parts of the rate 1/ for two different periods of time. While the fixed portion of the tariff was to become effective one day following issuance of the order, the variable portion of the tariff, the fuel adjustment clause, would remain suspended for a period, the length of which was to be determined by the time it would take for the Company to file an acceptable substitute. During the intervening period, CL&P wholesale customers would be billed for fuel adjustments under the R-1 fuel clause, which was in effect prior to the filing of the R-2 rate. 2/

On September 6, 1974, the Municipals filed for an emergency stay and rehearing of the Commission's August 30, 1974, order (JA, pp. 44-65).

First, the Municipals noted that the pre-existing R-1 fuel clause was designed to operate in conjunction with a complementary portion of the R-1 tariff. This R-2 tariff was premised upon a .647 cent per kilowtt hour (KWH) cost

---

1/ The R-2 fuel clause became operative when the Company's base cost of fuel contained in the R-2 rate exceeded .905¢ per kilowatt hour. The earlier R-1 fuel clause became operative when the Company's base cost of fuel as contained in the R-1 rate exceeded .647 cents per kilowatt hour. In each instance, the fuel clause was inseparably meshed with the rate of the Company through the base cost trigger.

2/ See Hope Natural Gas Co. v. FPC, 196 F.2d 803(4th Cir. 1952) which established that during a period of suspension the currently effective rate is continued in effect.

of fuel, where as the R-2 tariff employs a .905 cents per KWH fuel cost (such quantities are designated as the "base cost of fuel" for purposes of rate pricing). Each tariff operates to recover all fuel costs, up to and including the base cost of fuel, as part of the charges imposed by the static portion of the rate. It is only amounts in excess thereof which are recovered via the respective fuel adjustment clauses. The pairing of the R-2 static tariff with the R-1 fuel clause, which the Commission by the terms of its August 30 order had dictated is an obvious mismatch, one that results in a double collection of fuel costs associated with wholesale consumer energy purposes between actual fuel cost levels of .64 cents per KWH (a level which triggers operation of the R-1 fuel cost) and .905 cents per KWH (the level at which a fuel clause properly matched with the R-2 basic tariff is designed to commence operation, and up to which level the basic tariff recovers all fuel costs). In other words, when the actual fuel costs experienced by the Company is .905 cents per KWH, the hybrid tariff will recover .905 cents per KWH as the fuel cost portion of the charges imposed per KWH by the R-2 static tariff, plus an additional, and wholly unwarranted .258 cents per KWH (.905 minus .647 cents per KWH) by operation of the R-1 fuel clause. 1/

1/ For the month of September 1974 alone, this "rate" would impose costs upon the six municipal petitioners which exceeded the amount of which might be imposed under CL&P's R-2 rate as originally filed, by $103,245, or 7.25% in excess of original R-2 revenues. See JA p. 3-4 , as well as Appendix A to this Brief.

Second, the Municipals reiterated their need for suspension of the new restrictive R-2 rate design and an immediate hearing to resolve its anticompetitive consequences prior to becoming effective.

Several weeks after the August 30 order in the present case, Chairman Nassikas on September 11, 1974 announced to a group of state regulatory Commissioners assembled in Washington that the Federal Power Commission was following a new policy of issuing only one-day suspensions.[1/] Review of other new rate filings at the time the present case was pending before the Commission revealed a recently implemented uniform practice, not formalized by order of suspending all such filings for only one day, apparently without regard to the facts or merits of the particular case.

The Commission on September 27, 1974, issued an "Order Amending and Clarifying Prior Order and Denying Stay and Rehearing." (JA pp.79-82). In response to the Municipals' contention relating to the clear error as to the rate of return, the Commission said this was a typographical error and that it had intended to state 9.16%. As to the double charge resulting from its failure to reject the rate, and the interrelated fuel clause and the utilization of different suspension periods for each, the Commission sought to subvert

1/ Attached hereto as JA pp.66-78) is the Chairman's speech.

the plain language of its earlier order by stating that the Municipals had misinterpreted the order of August 30:

> ...in the order of August 30, 1974, we stated that:
>
> > the proposed changes have not been shown to be just and reasonable and may be unjust, unreasonable... Accordingly, we shall suspend the proposed changes for one day ... (Emphasis added).
> >
> > Since the R-2 fuel clause is one of the 'proposed changes referred to in the order, therefore, as originally ordered it was 'suspended for one day the use thereof deferred until December 2, 1974 subject to refund.

In the August 30, 1974 order, however, the Commission provided for a suspension of the R-2 clause of indeterminative length. The inconsistency is heightened by the failure of the Commission to address itself thereto in the September 27 order which, in effect, leaves an error apparent on the face of these orders, the operative papers in this proceeding.

On October 11, 1974, the Municipals filed for a reconsideration of the Commission's order of September 27, 1974, (JA, pp 87-95), stressing the adverse impact on them of the Commission's refusal to reject the R-2 rate and fuel clause or to suspend it for more than one day. The Municipals requested to see the Commission's records of its August 30, 1974, order under the Freedom of Information

Act, and challenged the new across-the-board policy of one-day suspensions of all new rate filings as announced by Chairman Nassikas to the press on September 11, 1974, as contrary to the mandate of the Federal Power Act, requiring a reasonable review of each case on its merits.

On September 30, 1974, the Company filed a superseding fuel clause which purported to be in accordance with the Commission's order of August 30, 1974, requesting that it be put into effect retroactively as of September 2, 1974, the effective date of that portion of the R-2 rate which was suspended for only one day (JA, p p. 83-86).

However, the Company's September 30 filing perpetuates and extends the same onerous effects upon the wholesale customers noted previously and imposes a rate increase on the wholesale customers over and above the total amount it sought to collect in its original R-2 filing. The September 30 filing changed the .905 cents per KWH base in the original R-2 fuel clause rejected by the Commission to .6363 cents per KWH base cost of fuel. Since the R-2 underlying tariff is premised upon a .905 cents per KWH base cost, see pp. 7-8 , supra, a result identical to that experienced by the Petitioners in the aftermath of the August 30 order, which mismatched the R-1 fuel clause with the R-2 underlying tariff, could be imposed upon the Petitioners, this time with even more severe economic con-

sequences. For example, the Town of Wallingford, Connecticut, alone could be subjected to an estimated excess charge of $75,000 per month over and above that which the R-2 rate, as originally filed,would impose. Appendix B reveals that a total charge of $390,899 could be charged under the revised fuel cost to the Municipals over and above the original total rates sought by CL&P in its R-2 rate filing.

The Municipals on October 23, 1974, filed a protest and petition to intervene and motion to reject in opposition to the revised R-2 fuel clause (JA, p. 96) on the ground that it did not comply with other FPC regulations and in the alternative requested the full five-month suspension for the R-2 rate.

The Company subsequently has conceded that its revised R-2 fuel clause,filed September 30, 1974, does effect a rate increase over and above the total rate increase sought in the original R-2 filing. In a letter dated November 5, 1974, by CL&P's Vice President Edwin L. Johnson, in response to a request for information, the Company conceded that its revised fuel clause would result in an increase of $.00142 per kilowatt hour over its original filed R-2 fuel clause (Exhibit E). The net impact of the revised fuel clause would be a rate increase as previously noted to the Municipals of over $390,000 above the original R-2

rate as filed.

Thereafter, on November 7, 1974, the Company filed its response to the Municipals' October 23 protest and motion to reject in which it formally acknowledged that the revised fuel clause would not track with the basic portion of the R-2 rate and would produce "inconsistencies" stating that:

> Any such inconsistencies could not have been avoided in complying with the order (of August 30) without undertaking a complete redetermination of the energy charges under the R-2 rate, a lengthy and costly undertaking which was not ordered by the Commission (emphasis added). (JA, p. 103)

The Commission by order of November 8, 1974, JA, p. 106) responded to Petitioners' October 11 petition for reconsideration. Therein, it refused to reject and again stated that a one-day suspension of both components of the R-2 rate had been envisioned. However, unlike the September 27 order, the Commission now acknowledged that it had orginally held that:

> The suspension of the fuel clause will be lifted upon receipt of a filing and satisfactory compliance with Opinion No. 633.

On November 29, 1974, the Commission issued an order approving CL&P's revised fuel clause retroactive to September 2, 1974, and applicable to the future. The Commission conceded that the revised fuel clause it was approving would not track with the R-2 base rate and that the Company had

not complied with the Commission's regulations, but the Commission refused to reject the rate and permitted the clause to be effective for the future without hearing or refunds beyond the date of the Commission's order. The Petitioners appealed to this Court on November 15, 1974.

ARGUMENT

I. THE COMMISSION ERRED IN REFUSING TO REJECT CL&P's FILING BECAUSE THE FUEL CLAUSE BOTH,AS INITIALLY PROPOSED AND AS SUBSTITUTED, PATENTLY FAILED TO CONFORM TO THE REQUIREMENTS OF SECTION 35.13 and 35.14 OF THE FEDERAL POWER COMMISSION's REGULATIONS THUS REQUIRING REJECTION PURSUANT TO SECTION 35.5 OF THOSE REGULATIONS

In its order of August 30, 1974, the Commission found that CL&P's proposed fuel adjustment clause computed the Company's own fuel cost variations to its purchased energy and thus was not in conformity with Opinion No. 633:

> We note that CL&P's proposed fuel adjustment clause imputes the Company's own fuel cost variations to its purchased energy, and thus is subject to suspension since it may result in rates which are not just and reasonable. Accordingly, we shall provide for the filing of a fuel adjustment clause which conforms to Opinion No. 633. The suspension of the fuel clause will be lifted upon receipt of a filing in satisfactory compliance of Opinion No. 633. (JA, p.17).

Opinion No. 633 was based on the requirements of Section 35.14(a)(2) of the Commission's regulations that the base cost of fuel shall include no items other than those which are actual fuel costs. The Commission in Opinion No. 633 held that:

> Fuel adjustment clauses which are <u>not</u> in conformity with the principles set out in Section 35.14 of our regulations under the Federal Power Act are <u>not</u> in the public interest. Conversely, we found by adopting such regulation that fuel adjustment clauses are both lawful under the Federal Power Act and sound as a matter regulatory policy <u>if</u> as stated therein, (1) they "reflect changes

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December 16, 1974

Mr. A. Daniel Fusaro, Clerk
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York 10007

Re: The City of Groton, et al v. Federal Power Commission Docket No. 74-2480

Dear Mr. Fusaro:

Please be advised that the brief for Petitioners in the above-captioned proceeding, filed December 13, 1974, contained several errors as regards the order and content of the exhibits thereto.

On page 12, the Exhibit there inadvertently labeled "E" is properly designated "F", the latter having been omitted from the filing. Exhibit "F", properly labeled, is attached hereto.

On page 16, footnote 1 should refer to Exhibit "E", not to Exhibit "C" as shown.

On page 19, footnote 1 incorrectly references Exhibit "E". This reference should have been made to Exhibit "G", which is attached hereto.

Twenty-five copies of this letter, plus attachments, are filed pursuant to the rules of this Court. I trust that any inconvenience caused by this error has been minimal.

Very truly yours,

John A. Cameron, Jr.
Attorney for the City of Groton, et al.

JAC/chm

Enclosures

EXHIBIT F

THE CONNECTICUT LIGHT AND POWER COMPANY

A NORTHEAST UTILITIES COMPANY

EDWIN L. JOHNSON
Vice-President

November 5, 1974

RECEIVED
NOV 5 1974
GENERAL MANAGER
ELECTRIC DIVISION

Mr. John P. Gallagher, General Manager
Electric Division
Department of Public Utilities
100 John Street
Wallingford, Connecticut 06492

Dear Mr. Gallagher:

The following information has been prepared in response to the questions raised in your letter of October 14, 1974. I trust that this response will clarify your questions regarding the September, 1974 bill and accordingly that the bill will be paid promptly.

Q 1&2 The System Demand utilized for invoicing the period 8/30/74 to 9/2/74 (62 hours) as well as the period 8/30/74 to 9/30/74 was incurred 6/10/74, 10:00 - 11:00 a.m. (57850 kW - 1500 kW station service = 56350 kW). It appears that the amounts referenced in your questions 1 & 2 result from use of a System Demand of 56750 kW which was established on 8/28/73 but which was not applicable to billing in September 1974. Consequently, we believe that the invoice amounts shown on bills for these periods are correct.

Q 3 Question 3 asks for clarification relative to the total dollars shown on the Rate Comparison sheets for Schedule II. To be precise, this total should have been identified as representing the sum of billed amounts for periods 8/30 - 9/1/74 under R-1 and 9/2 - 9/30 under R-2. Since prorating had to be used for the September billing, it was felt that this was the appropriate way to present the comparison.

Q 4 We agree that the statement regarding fossil fuel adjustment rates accompanying the fuel clause computations is indeed incorrect in its indication in that it applies for one day September 1, 1974. In actuality the rate was utilized for the entire September 1974 billing computations under the R-1 rate.

Q 5 No answer necessary.

Q 6 You indicate in question 6 that during September 1974 your maximum demand on CL&P was 44 mW. While it is not entirely clear from this question or from your subsequent letter of 10/24/74 whether in fact you have revised the operation of your generation to hold the CL&P supplied demand to 44 mW, we presume this to be the case. Accordingly, an appropriate billing adjustment will be made. In view of the fact that this apparent change in operation was made prior to September 2, 1974 rather than subsequent to that date (as contemplated by our letter of 10/9/74) the adjustment will be made effective to your September 1974 and subsequent bills unless you establish a higher demand on the CL&P supply.

Q 7 In accordance with the FPC's direction that the fuel adjustment clause be revised to conform with Opinion 633 so as to avoid imputing CL&P's costs to its purchases, the revised filing eliminated the effect of interchange transactions from the base cost determination (Statement O) as well as from the monthly cost determination. This change, which provides a consistent determination of both factors used in the monthly adjustment rate computations, accounts for the difference noted in your question.

Q 8 Because both the base cost and monthly cost for fuel adjustment purposes differ under the revised fuel formula from those included in the original filing, the difference in the fuel adjustment rate will not be $.002687 per kWh. For example, the September fuel adjustment charge under the R-2 rate determined using the original .905¢/kWh base cost was $.00894/kWh whereas using the revised .6363¢/kWh base cost the charge would be $.009982/kWh. Thus, the difference for September is $.001042/kWh rather than $.002687/kWh. Assuming the revised filing is accepted by the FPC to become effective on September 2, 1974 as requested, an appropriate billing adjustment will be made.

Very truly yours,

Edwin L. Johnson

Edwin L. Johnson
Vice President

RECEIVED
NOV 5 1974
GENERAL MANAGER
ELECTRIC DIVISION

EXHIBIT G

Sec. 35.13. **Filing of changes in rate schedules.**—(a) The letter of a public utility transmitting to the Commission for filing a rate schedule, or part thereof, to supersede, supplement or otherwise change the provisions of a rate schedule required to be on file with the Commission, shall list the documents submitted with the filing; give the date on which the filing public utility proposes to make the changes in service and/or rate, charge, classification, rule, regulation, practice or contract effective; state the names and addresses of those to whom copies of the rate schedule has been mailed; include a brief description of the proposed changes in service and/or rate, charges, etc.; state the reasons for the proposed changes; and summarize the circumstances which show that all requisite agreement to the rate schedule or the filing thereof, including any contract embodied therein, has in fact been obtained. In the case of coordination and interchange arrangements in the nature of power pooling transactions, all supporting data required to be submitted in support of a rate schedule filing shall also be submitted by parties filing certificates of concurrence, or a representative to file supporting data on behalf of all parties may be designated as provided in § 35.1 above.

(b) In addition the following material shall be submitted:

(1) A statement comparing sales and services and revenues therefrom, by months and for the year, under both the rate schedule proposed to be superseded or supplemented and the proposed changed rate schedule, each applied to the transactions for the 12 months immediately preceding and to the 12 months immediately succeeding the date on which the new rate schedule is to become effective. Such comparisons should be made for each class of service, for each customer, and for each delivery point. The billing quantities involved in the computation of the charges should also be shown.

(2) A comparison of the proposed rate with other rates of the filing public utility for similar wholesale and for transmission services.

(3) If any facilities are installed or modified in order to supply the service to be furnished under the proposed rate schedule, the filing public utility shall show on appropriate available map (or sketch) and single line diagram the additions or changes to be made.

(4)(i) Except as provided in subdivision (ii) below, if the rate schedule provides for an increased rate, then 60 days prior to the date that such changed rate is proposed to become effective the filing public utility shall submit a statement showing its cost of the service to be supplied under the new rate schedule according to supporting statements A through O as described below. Simultaneously, the public utility shall submit the material on sales and revenues described in (a) above and, unless the rate schedule containing the proposed increased rate is likewise simultaneously filed, a summary statement of such proposed increased rate; *provided, however,* that the submittal of such summary statement of the rate schedule shall not be in lieu of the rate schedule as required to be filed with the Commission pursuant to these Regulations.

(ii) No cost of service data shall be required in cases where the application of the proposed change in rate schedule effects rate increases of less than $50,000 annually resulting from, but incidental to, changes such as a rate design, delivery points and delivery voltage. Specifically designed rate increases of less than $50,000 annually (as opposed to incidental increases), increases resulting from changes made in fuel clauses, and increases of rates comprising an integral part of coordination and interchange arrangements in the nature of power pooling transactions, shall be supported by cost data as identified in § 35.12(b)(2).

(iii) The statement of the cost of services should contain unadjusted system costs for the most recent twelve consecutive months for which actual data are available (Period I) including return, taxes, depreciation, and operating expenses, and an allocation of such cost to the service rendered. The statement of cost of service shall include an attestation by the chief accounting officer or other accounting representative of the filing public utility that the cost statements and supporting data submitted as a part of the filing which purport to reflect the books of the public utility do, in fact, set forth the results shown by such books. Following is a description of statements A through O required to be filed pursuant to this subparagraph. In addition, the public utility shall file statements A through O together with related work papers based on estimates for any twelve consecutive months beginning after the end of Period I but no later than the date the rates are proposed to become effective (Period II). Full explanation of the bases of each of the estimated figures shall be included, Period II shall be the "test period".

> in the fuel component (and fuel only) per kilowatt hour of delivered energy costs), (2) the base cost of fuel includes no items other than those in Account 151 of the Commission's Uniform System of Accounts for Public Utilities and Licenses and (3) adjustments do not apply to hydro-electric generated energy. [48 F.P.C. at p. 905 (emphasis in the original).] 1/

The Commission held in the August 30, order that the imputation by a company of its own fuel costs to power purchased from others which is neither ascertainable nor paid for as a fuel cost is improper and contrary to Section 35.14 of its regulations allowing only actual identifiable fuel costs to be charged to its customers. CL&P's R-2 fuel clause clearly violated this provision of the Commission's regulations and would have allowed the Company to collect hypothetical fuel costs from its customers.

However, despite the clear violation of its regulations, Section 35.14(a), the Commission did not reject the fuel clause as requested by the Cities. In so doing, the Commission violated Section 35.5 of its

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1/ New England Power Company, 48 F.P.C. 899 (1972). Section 35.14 as it applied at the time of the Commission's orders is set forth in Exhibit C to this brief.

regulations which requires filings patently incompatible with the Commission's regulations to be rejected. Section 35.5 provides as follows:

> Rejection of materials submitted for filing. -- The Secretary, pursuant to the Commission's Rules of Practice and Procedure and Delegation of Commission Authority, shall reject any material which patently fails to substantially comply with the applicable requirements set forth in this part or the Commission's Rules of Practice and Procedure. (Emphasis added.)

The subsequent confused, conflicting and arbitrary series of orders by the Commission, the result of its failure to reject, demonstrate why CL&P's rate filing should have been rejected as required by the regulations to protect consumers. As previously noted, the Commission's order of August 30, 1974, while holding the R-2 fuel clause to be illegal, did not reject it but suspended it, stating "the suspension of the fuel clause will be lifted upon receipt of the filing of satisfactory compliance with Opinion No. 633." (J.A.p.17) While the fuel clause was thus suspended indefinitely until a correct one was filed 1/ the Commission suspended the base rate to which the fuel clause applied only for one day. This created a highly predudicial situation for the

1/ The company was ordered to do so in 30 days.

Municipals because the Company could have applied its old R-1 fuel clause to its new R-2 base rate. The new R-2 base rate included fuel costs up to a base of .905 cents per kilowatt hour, but the R-2 fuel clause permitted an extra fuel charge after fuel costs exceeded .647 cents per kilowatt hour. The clear net result would be a double charge for fuel to the municipals, amounting to charges of $679,739 to the Cities over and above the R-2 rate as filed (See Exhibit A hereto). Municipals objected in a petition for rehearing filed with the Commission (J.A. 44-65). The Commission's next order on rehearing issued on September 27, 1974 should have rejected the entire filing as the only way to clear up the matter. Instead the Commission confused the matter more by saying that the August 30, order, despite its clear language to the contrary, meant for the R-2 fuel clause to be suspended for only one day, the same as the R-2 base rate (J.A.79-82). But this left the Company free to charge an admittedly illegal fuel cost.

CL&P on September 30, 1974 filed a revised R-2 fuel clause seeking to rectify the problem by requesting that it be put into effect retroactively to September 2, 1974 (J.A.83-86). 1/ The revised R-2 fuel clause, however, had

1/ The Commission lacks authority to put new rates into effect retroactively. Montana Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1950).

a new triggering rate of .6363 cents per kilowatt hour, instead of the .905 cents per kilowatt hour of the original R-2 fuel clause. The revised R-2 fuel clause did not track with the basic R-2 rate which the Commission had suspended for only one day in its August 30, 1974 order. The net result was, as the Municipals pointed out in their motion to reject the revised R-2 fuel clause (J.A.96-101) that there was a serious mismatching of the base rate with the revised R-2 fuel clause with the result that the Cities would be charged twice for fuel. The net result for the Company's revised R-2 fuel clause would be that the municipals would be charged $390,899 beyond the original filed rate by CL&P (See Exhibit B hereto). The revised R-2 fuel clause had a further defect -- the Company failed to file with it the necessary supporting data required under the Commission's regulations, §35.13(b)(1). 1/ Had this data been filed, the double overcharge to the Cities would have been clear. Despite this second independent failure of CL&P to comply with the Commission's regulations, the Commission in an order issued November 29, 1974, (J.A.

1/ The text of these regulations is attached hereto as Exhibit E.

refused to reject a revised R-2 fuel clause and accompanying rate, permitting it to go into effect retroactively on September 2, 1974. The Commission acknowledged in its November 29 order that the substituted fuel clause did not track the base part of the R-2 rate so that improper revenues would be collected and the Commission further conceded that the filing did not conform with Sections 35.14(b) and 35.13(b)(1) of the Commission's regulations and that subsequent to a November 4, 1974 additional data filing by mailgram of CL&P that the substituted fuel adjustment clause still did not comply with Section 35.13(b)(1). However, instead of rejecting the fuel clause as inconsistent with its regulations, as requested by the Cities and required by Section 35.5 of those regulations, the Commission permitted the substitute fuel clause to become effective and merely required the Company to supply the missing data within 30 days. The net result of the Commission's failure to reject the original as well as the revised rate was the approval of a mis-matched base R-2 rate with a revised fuel clause as conceded both by the Commission and the Company. Municipals clearly have been and will be subjected to continuing improper charges for fuel under the Commission's order. 1/ The asserted "refunds" ordered in the November 29,

1/ Actually there will be no refunds because under the Company's revised fuel clause the Cities will be billed for higher rates than under the original R-2 rate which the Commission held illegal.

1974 order do not go to this basic error which will continue for the future but cover only the difference between the revised fuel clause rate and the fuel which the Company has actually billed from September 2 to November 29. The November 29 order added insult to injury by providing that the revised fuel clause, despite the absence of any hearing thereon, was a final rate, not subject to any further refund (Ordering paragraph (B) (J.A. p.116).

The Commission's action conflicts with its duty to reject a tariff that is in conflict with an agency regulation or order 1/ and this refusal is reviewable by the courts 2/

The propriety of the Commission establishing regulations that require rejection of filings which contain provisions which conflict with the public interest is most recently addressed by the Supreme Court in FPC v. Texaco, Inc., 377 U.S. 33 (1964). In that proceeding which involved the rejection of an application for a certificate under the Natural Gas Act because it contained pricing provisions not permissible under the Commission's

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1/ See e.g., Associated Press v. Federal Communications Commission, 448 F.2d 1095, 1103 (D.C. Cir. 1971) and see Permian Basin Area Rate cases, 390 U.S. 747 (1968); FPC v. Hunt 376 U.S. 545 (1964); Amerada Petroleum Corp. v. FPC, 293 F.2d 572 (10th Cir. 1961) cert. denied, 368 U.S. 976 (1962); United Gas Pipe Line Co. v. Mobil Gas Service Corp., 350 U.S. 332 (1956); Isbrandtsen Co. v. United States, 211 F.2d 51, cert. denied, sub nom, Japan, Atlantic and Gulf Conference v. United States, 347 U.S. 990; see Trade Lines, Inc. v. United States, 168 Sup. 819 (S.D.N. Y. 1958).

2/ Id.

regulations implementing the Natural Gas Act, the Court held that it was proper for the Commission to particularize statutory standards through the rule-making process and to bar at the threshold those who neither followed those standards nor showed reasons why the public interest required waiver of the regulations. Id. at p. 39.

The Commission has thus created an illegal ad hoc exception for CL&P from the rejection requirements of its regulations. Such conduct has been consistently proscribed by the courts. For example, in McKay v. Wahlenmaier, 226 F.2d 34, 43 (D.C. Cir. 1955) Judge Wilbur K. Miller speaking for the court held:

> It is argued that, since the Secretary devised the regulation, he alone has the right to say what the consequences of violating it should be. Whether that is so, we need not decide. The Secretary is bound by his own regulation as long as it remains in effect. He is also bound, we think, to treat alike all violators of regulation. He may not justify, simply by saying that the violation is unimportant, his departure in a single case from an otherwise consistent policy rejecting applications which do not conform to the regulations.

Further, the courts have repeatedly emphasized that: agency action that substantially and prejudicially violates the agency's rules cannot stand." 1/ It is

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1/ Sagamon Valley Television Corp. v. U.S., 269 F.2d, 221,224 (D.C. Cir. 1959). accord Bonena, Inc. v. Wirtz, 369 F.2d, 208,(D.C. Cir. 1966). Jefferson Amusement Co. v. FPC, 266 F.2d 277, 280 (D.C. Cir. 1955), McKay v. Wahlenmaier, supra.

therefore appropriate for this Court to intervene by remand of the proceeding with instructions to the Commission to fully and evenly implement the rejection provisions of its regulations.

II. THE COMMISSION WITHOUT EXPLANATION HAS EMBARKED UPON A NEW POLICY OF NOMINAL SUSPENSIONS INCONSISTENT WITH ITS PRIOR PRACTICE AND WITH THE POLICIES UNDERLYING SECTION 205(e) OF THE FEDERAL POWER ACT.

A. The Commission Without Findings Or Standards To Substantiate It Has Embarked On An Unprecedented Policy Of Suspension Of Rates For Nominal Periods Which Is Totally Inconsistent With Its Prior Established Procedure.

The Commission's embarkation upon a new suspension policy is at odds with the Congressional mandate and its preexisting policy to fully protect the consumer. This conclusion is inescapably drawn from the facts which Petitioners here present.

On September 11, 1974, at a meeting of certain state and federal officials convened in Washington, D.C., John N. Nassikas, Chairman of the Federal Power Commission remarked that:

> ...as a means of reducing regulatory lag and improving cash flow for rate proponents, we have made more frequent use of suspensions less than the five months authorized by the Federal Power Act -- including one-day suspensions.

Following the prepared address exerpted above, the Chairman was reported to have gone still further in enunciating a new Commission policy during his impromptu remarks, stating an across-the-board policy of one-day suspension orders:

> The FPC Chairman said that, to reduce regulatory lage and improve cash flow for utilities, the agency more frequently has been using rate sus-

> pensions of only one day rather than the five months authorized by law for electric rate increase requests.
>
> Normally, the FPC automatically has suspended rate increase proposals for several months, often the maximum five month period, while it considered the merits of the proposal. The agency recently has suspended the increases for only one day, then letting utilities immediately put into effect the higher rates they want, but subject to any refunds the agency may order. Mr. Nassikas suggested that state regulators use the same approach. 1/

These pronouncements clearly hearld a new policy. In effect, the Commission has unilaterally reduced the maximum period of suspension which it will order -- in nearly every instance to the miniscule length of one day. 2/

1/ Wall Street Journal, Eastern Edition, at p. 17 (Sept. 12, 1974), which is attached hereto as Exhibit C. See also Public Power Weekly Newsletter, No. 74-36, p.1 (Sept. 13, 1974), which is attached hereto as Exhibit D.

2/ A marked contrast in the length of suspensions ordered may be observed by comparing orders issued in former years to those of most recent vintage:

July, August 1972	62.5% of filed rates suspended for the full 5 months, 25% for 45 days, 12.5% for 1 day.
July, August 1973	40% for 5 months, 60% for 60 days, 0% for 1 day.
July, August 1974	78% for 1 day, 22% for 5 months.
August 30 et seq.	All for 1 day, with only two minor exceptions:

Among the one-day suspension ordered were Iowa-Illinois Gas & Electric Co., Docket No. E-8997, requested increase of $195,730, order issued Sept. 27, 1974; Orange & Rockland

(footnote continued)

Petitioners do not argue that the Commission is bound to order five-month suspensions under all circumstances, but rather that the Commission as developed in Section B, infra, has been directed by Congress to consider the consumer interest in each and every exercise of its suspension authority, and fashion a suspension order to insulate consumers from untested rate schedules for the period it determines necessary to optimize that protection up to the maximum allowable.

At an earlier time in its history, the Commission articulated and implemented the Congressional intent underlying its suspension policy authority, and established the statements of suspension which it has followed until the recent deviation therefrom. In Hope Natural Gas Co., 8 F.P.C.

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footnote continued

Utilities, Inc., Docket Nos. E-8999 and E-9000, requested increase of $549,203, order issued Sept. 27, 1974; Interstate Power Co., Docket No. E-9023, requested increase of $197,001, order issued Oct. 18, 1974; Delmarva Power & Light Co., Docket No. E-8947, requested increase of $4,188,340; order issued Oct. 24, 1974; and Commonwealth Edison Co., Docket No. E-9002, requested increase of $3,940,000, order issued Oct. 29, 1974. Each and every one of these orders contains the same findings as to suspension propriety, identical save for the necessarily individualized references to company name and docket number.

Only two exceptions to this new practice have been noted: Rockland Electric Co., Docket No. E-9001, order issued Sept. 27, 1974, 45-day suspension; and Alabama Power Co., Docket No. E-8851, 57-day suspension, order issued Sept. 12, 1974. Each suspension order is to be noted both for its brevity vis-a-vis the five-month maximum allowable, and for the seeming arbitrariness of the number of days selected, perhaps a random choice in response to criticism of automatic one-day suspension orders.

1290, 1291 (1949), the Commission dealt with the parallel provision of the Natural Gas Act, responding to the motion of a supplier utility for an abbreviated suspension period under promise that it would refund all amounts collected found to be excessive. It stated:

> The motion of Hope, if granted, would, in our opinion, serve to circumvent the Congressional purpose expressed in the statutory scheme provided in section 4 of the Natural Gas Act, particularly subsection (c) thereof, prescribing the manner in which changes in effective rates and charges may be made and assuring to the Commission an opportunity through the exercise of the suspension power to scrutinize carefully such proposals which may unlawfully affect the interest of the ultimate consumers. In accordance with such statutory scheme, and the mandate of the act requiring prompt disposition of matters of this kind, the Commission is proceeding with due diligence in the studies and investigation required to enable an enlightened determination as to the rates and charges proposed by Hope. It is anticipated that hearings herein will be commenced at a date sufficiently early to permit a decision by the Commission prior to the expiration of the period of suspension heretofore ordered.
>
> Under the circumstances we consider it necessary and appropriate in the public interest that the suspension and deferment be continued in effect as heretofore ordered. It follows, therefore, that the motion of Hope must and should be denied. (Emphasis supplied.)

Thus, the Commission demonstrated early in its history an awareness of the statutory parameters of its suspension authority which dictate that it address itself to the individual circumstances of each case before it acts so as to arrive at a period of suspension that will adequately protect the ratepaying consumer.

B. The Commission's Nominal Suspension Policy Deviates From The Congressional Policy Underlying And Expressed In Section 205(e) Of The Federal Power Act.

The legislative history underlying the suspension provisions of the Interstate Commerce Act from which the suspension provisions of the Federal Power Act are bodily taken 1/ evidences a clear intention on the part of Congress to protect consumers from the imposition of increased rates which might, as the result of a hearing, be found unjust and unreasonable. It was the consensus of Congress, particularly focusing upon the deleterious economic affect of the absence of suspension authority on the small supplier 2/ that the Interstate Commerce Commission should be empowered to suspend a newly-filed rate to protect consumers from increased charges under an untested rate. 3/ The only controversy was over the length of time of the proposed suspension period, would it be 60 days or 120 days or an indefinite period. 4/

1/ Statement of FPC Commissioner Clyde L. Seavey, Hearings Before the House Committee on Interstate and Foreign Commerce on the Public Utility Holding Company Act at 392 (March 7, 1935).

2/ Id.

3/ Statement of Congressman Needham during a session of the House Committee on Interstate and Foregoing Commerce, 5846, Cong. Record, 61st Cong., 2d Sess. (May 5, 1910).

4/ See e.g., S.6737, 61st Cong., 2d Sess. which contained 1 60-day maximum and Senate Report No. 355, part 2, 61st Cong., 2d Sess. Views of the Minority to Accompany S.6737 which advocated indefinite suspension pending completion of the rate proceeding.

The deliberations on the suspension provision for the Interstate Commerce Commission provides a clear indication of Congress' understanding of how and when a regulatory agency's suspension power should be exercised:

> Now, the rate is raised by the road, and the commission only has the power to suspend either upon complaint or on their own initiative, and we know, as a matter of fact, the commission is not going to suspend the rates wholesale; that they are not going to suspend except where there is a complaint or where the commission of its own knowledge knows that there ought to be an investigation before the rate is permitted to take effect, or where it is patent on the face of it that the increase is so great as to demand an investigation. In these cases the commission should have the right to such time as is necessary to make a full, fair, and complete investigation to determine whether the rate is right, fair, and just between the road and the people or the shippers.
>
> On the other hand, if after a full and thorough investigation the Commission decides that the rate is not a fair one they should have the right to veto it. But they should have sufficient time in which to make the investigation. The bill as originally introduced limited the commission to sixty days. It was amended so as to give one hundred and twenty days, but there should be no limit on it whatever. We should trust it to the commission. If it takes ten days, well and good. If it takes one hundred and twenty days, well and good; and if it took six hundred days in order to do justice to the railroads and the shippers, let them have that time. We should place confidence in the commission that they will not use power arbitrarily. I believe that the commission will do justice to all parties, and therefore I hope that the amendment offered by the gentleman from Illinois [Mr. Madden] will receive as near unanimous support of this House as it is possible to get. 1/ (Emphasis supplied.)

1/ Statement of Congressman Sims during a Session of the House Committee on Interstate and Foreign Commerce, Cong. Rec., 61st Cong., 2d Sess., at 5846 (May 5, 1910).

Thus it is clear that in instances where an investigation was to precede rate effectiveness, either because of the complaint of a ratepaying consumer, or because the Commission had determined sua sponte that such investigation was necessary, Congress expected that the Commission, which had requested such authority in the first instance, would suspend the rate change in such a manner as to protect the consumer interest.

It is also clear that Congress in this legislation balanced competing interests of the carrier and the supplier and chose to limit the maximum period of suspension to 120 days a period which was at the time considered for completion of a hearing on the justness and reasonableness of the proposed rate in most instances.

Further, when exigencies required that this balance be recast, Congress itself, rather than the Commission, did so by either expanding or contracting the maximum period of suspension. In 1920, when Congress determined that the ten-month suspension period created a serious problem of regulatory lag for rate proponents , it statutorily reduced the period to five months. In 1927, at the Commission's request, Congress enlarged the statutory period to the present seven months to allow more time for

the completion of the necessary rate proceedings prior to the time when the rate would become effective.

It is apparent from this early history of the interaction of the Interstate Commerce Commission with the Congress that agency suspension authority was to be fully utilized to the extent necessary to protect consumers up to the statutory limits imposed by Congress. 1/ This interaction carries over into the Federal Power Act which as previously noted is patterned upon the Interstate Commerce Act. Thus the FPC in Section 205(e) of the Federal Power Act is authorized, after delivery to the affected public utility of a statement of its reasons, to suspend new rate schedules for the maximum period of five months beyond the time when the rate would otherwise go into effect and the legality of that suspension period as reflecting a balance between competing interests with the emphasis on consumer protection has been upheld by the courts. 2/

1/ A bill is presently under consideration in the House which would again modify I.C.C. suspension authority. The bill would restrict the Commission's power to suspend certain railroad rates, apparently because of financial problems besetting the carriers. Such Congressional action is in stark contrast to the unilateral method of reducing the suspension period employed by the FPC. See Wall Street Journal, Eastern Ed. at 14 (Dec. 11, 1974).

2/ See Hope Natural Gas Company v. FPC, supra.

C. Petitioners Have Been Deprived Of An Appropriate Period Of Suspension By Reason Of The Commission's Failure To Consider The Effects Of The R-2 Rate Upon Them As Rate-paying Consumers, As Was Reflected In Current Data And In The FPC Initial Decision On The Predecessor CL&P R-1 Rate.

The Commission's failure to consider the interests of consumers in suspending the CL&P R-2 rate is underscored by the dissent registered by Commissioner Don S. Smith both to the August 30 and to the September 27 orders. In response to Petitioners' Petition for Emergency Stay pending Rehearing of September 6, 1974, on the matter of suspension, Commissioner Smith stated:

> Rehearing should be granted, enabling the Commission to correct the error it made in limiting the suspension period to one day by extending that period the full five months. The Commission should exercise its discretion as to an appropriate suspension period by reference to all of the information that can be gleaned from the instant filing, data developed from filings involving the same parties and similar issues in other dockets, and by appraising the contentions of all the parties and of its staff. (J.A. p. 82, emphasis added).

The Commissioner makes reference to "data developed from filings involving the same parties and similar issues in other dockets." Surely this concerns the matter of the findings made by FPC Administrative Law Judge Lande in his opinion of July 29, 1974, on the CL&P R-1 rate, which was superseded by the R-2 rate. In that opinion, most of the rate design provisions to which petitioning Municipals had objected were rejected, so also was the rate level which the Company had proposed. Petitioners stressed in

their R-2 petitions that the new rate incorporated many of the objectionable features present in the old schedule. They emphasized that both rate forms have the same effects upon the operation of Petitioners' utility systems, namely (1) they effectively prevent the wholesale consumer from attracting industrial and commercial customers and (2) they prevent the wholesale consumer from seeking out new sources of power on any reasonable basis.

It should further be noted that Commissioner Smith also indicates that the Commission has erred by failing to "apprais(e) the contentions of all the parties and of its staff." (Emphasis supplied.) The "parties" to which he refers must surely be the Petitioners, for the Company's contentions were certainly considered, indeed emphasized to the exclusion of all else.

Because the R-2 fuel clause is defective in design and was deemed subject to suspension, and because the R-1 fuel clause is patently noncompatible with the R-2 base rate, Commission precedent required that the new rate be suspended for the full five month period. In its order of July 12, 1974, in the Boston Edison Company proceeding, Docket No. E-8855, the Commission resolved the same fuel clause issue by granting a full five month suspension:

> We note that Edison's existing Rate S-2 (proposed to be increased by the instant filing and redesignated Rate S-3) and Edison's fuel adjustment clause

> are the subject of Commission investigation and hearing in Docket No. E-7738, et al., presently awaiting decision by the Presiding Administrative Law Judge. In that docket as in the instant filing, Edison's proposed fuel adjustment clause imputes the company's fuel cost variations to purchased power. Such imputation is not in conformance with our Opinion No. 633. However, since this very issue is undergoing consideration in the aforementioned docket, reconsideration of it in the instant docket would constitute improvident relitigation and would be an improper duplication of effort. Therefore, pending resolution of the issues in Docket No. E-7738, et al., we shall accept Edison's proposed fuel adjustment clause for filing and suspend it (in conjunction with the other issues raised by the instant filing) for the full statutory period . . . .(Mimeo Order , p. 2).

The facts were similar in the present case to those in Boston Edison, thus warranting imposition of the traditional five-month suspension of both R-2 and the R-2 fuel clause to provide equal treatment.

In contrast to Chairman Nassikas' definitive statements regarding the Commission's new policy on suspensions, the tally of suspension orders actually issued which, with minor exception, are for only one day, and Commissioner Smith's dissenting commentary on the Commission's failure to take consumer problems into account in fashioning suspension orders, is the Commission's formal utterance regarding suspensions within the context of the CL&P R-2 rate proceeding, a wholly conclusory,pro forma statement:

> Our review of CL&P's filing and the issues raised therein indicates that the proposed changes have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory,

> preferential or otherwise unlawful. Accordingly , we shall suspend the proposed changes for one day and establish hearing procedures to determine the justness and reasonableness of CL&P's filing. (J.A. 11).

If one accepts the Congressionally ordained suspension policy of insulating the ratepaying consumer from untested rate changes, as Petitioners argue the Commission must, this statement is a nonsequitor. The instant determination followed Petitioners' comprehensive presentation of the monetary and operating problems, affecting both the short-term cash flow and the viability of their utility systems, which would befall them under the R-2 rate, substantially documented by the R-1 rate opinion of Administrative Law Judge Lande, with no counter presentation of hardship by the Company. However, the Commission chose to afford Petitioner/consumers the minimum possible protection,--a one-day suspension, not even considering the particularized facts of the case. Thereafter, Petitioners through their counsel sought enlightenment on the reasoning which underlay the R-2 suspension order, requesting"transcripts, tapes, minutes of the Commissioners meetings" when the R-2 rate suspension was deliberated. In response thereto, the Commission's Secretary , Kenneth F. Plumb, in a letter dated November 11, 1974, stated:

> The Commission minutes show only final Commission action and the vote. The minutes do not reflect any discussion or comments by the Staff or the Commission.

As such, no justification has been presented for the Commission's policy departure, other than that which follows directly and by inference from the facts heretofore set forth in this brief.

Petitioners would argue that the evidence points inescapably to the conclusion that the Commission has chosen to ignore a Congressional directive by automatically suspending rate change schedules for nominal periods only, without regard for consumer problems which might dictate a considerably longer period.

D. It Is Established That Judicial Review Is Appropriate In All Instances In Which An Agency Has Failed To Explain And Substantite A Change In Its Policy Particularly When That Change Represents A Deviation From The Congressional Intent Underlying The Agencies Statutory Mandate.

It is established that in causes of action taken by a regulatory agency clearly in excess of its Congressionally delegated powers, judicial review of such action may be had to ensure complaince with statutory commands. 1/ The key authority for this proposition is Leedom v. Kyne , 358 U.S. 184(1958). As the Supreme Court stated in Leedom:

> This case, in its posture before us, involves "unlawful action of the Board [which] has inflicted an injury on the [respondent]." Does the law, "apart from the review provisions of the . . . Act," afford a remedy? We think the answer surely must be yes. This suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. 358 U.S. at 188.

1/ Leedom v. Kyne, 358 U.S. 184(1958); Long Island R.R. Co. v. United States, 193 F.Supp. 795 (E.D.N.Y. 1961) (three-judge court); Int'l Ass'n of Mach. & Aerospace Workers v. Nat'l Mediation Bd., 138 U.S. App. D.C. 96, 105, 425 F.2d 527, 536(1970); Int'l Bro. of Teamsters v. Brotherhood of Ry., Airline & Steamship Clerks, 131 U.S. App.D.C. 55, 64, 402 F.2d 196, 205, cert. denied sub. nom.; Brotherhood of Ry., Airline & Steamship Clerks v. National Mediation Board, 393 U.S. 848, 89 S.Ct. 135, 21 L.Ed 2d 119(1968); Int'l Ass'n of Tool Craftsmen v. Leedom, 107 U.S. App.D.C. 268, 276 F2d 514(1960).

The Court cited Switchmen's Union v. National Mediation Board, 320 U.S. 297 for the principle it deemed controlling in instances where an administrative agency disregarded the Congressionally ordained purpose of legislation it was required to enforce:

> If the absence of jurisdiction of the federal courts meant a sacrifice of obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in Texas & N.O.R. Co. v. Brotherhood of R.&S.S. Clerks, 284 U.S. 548, 74 L.ed 1034, 50 S.Ct. 427, and Virginia R. Co. v. System Federation, R.E. D. 300 U.S. 515, 81 L.ed 789, 57 S.Ct 592. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to which Congress had written into the Railway Labor Act. The result would have been that the 'right' of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose. Id. 320 U.S. at 300.

The Court concluded that where Congress had established a "right" for a given class, it would be remiss to assume that the legislative branch meant to foreclose "judicial protection of rights it confers against agency action taken in excess of delegated powers." 358 U.S. at 190. Based upon this determination, the Court affirmed the action of the lower court which had set aside agency action violative of its statutory mandate.

In Terminal Freight Handling Co. v. Solien, 444 F.2d 699 (8th Cir. 1971), the rule in Leedom was interpreted to

to include not only review of agency action violative of statutory prohibitions, but also action "in disregard of an affirmative or mandatory command." 444 F2d at 703. 1/

Parallel to Leedom, the instant action does not seek review of Commission action "made within its jurisdiction". Instead, Petitioners request that this Court perform the judicially cognizable task of determining the statutory parameters of such jurisdiction, for they strongly believe that the Commission has totally ignored the Congeresional mandate embodied in its grant of suspension authority that it adequately protect wholesale consumers of electric energy, such as Petitioners. This is not to suggest that the Congressional mandate encompasses the grant of a five-month suspension in all instances, but the Commission must be willing in all instances to address itself to the unique circumstances of each case and to suspend a rate for whatever period necessary to protect the individual consumers interest disclosed by its investigation up to and including a full five months. The case law fully supports this conclusion.

1/ See Miami Newspaper Priting Pressman's Union Local 46 v. McCulloch, 116 U.S. App.D.C. 243, 322 F2d 993 (1963).

In Arrow Transport Co. v. Southern Railway Co., 372 U.S. 658 (1963), it was held that the courts were powerless to extend the period of rate suspension beyond the statutory maximum of seven months set forth in Section 15(7) of the Commerce Act. Thereafter in United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973), the Court expanded its holding in Arrow to encompass a general proscription against judicial interference with the authority granted the I.C.C. to weight the factors present in a given rate proceeding so as to arrive at a period of rate suspension. This, of course, was an admonishment to the judiciary to refrain from second guessing the agency's determination on the facts and in so doing usurp the latter's primary jurisdiction over rate matters. Petitioners stress once again that they seek no determination by this Court of the merits of the R-2 rate, or any determination of the proper length of the suspension of that rate. They do request that the Court determine the legislative policy underlying Section 205(e) of the Federal Power Act so as to determine if the Commission has ignored said policy in the instant rate proceeding as reflected in its actions and in the statements of its Commissioners and return this case to the Commission with instructions to fully comply with its statutory mandate.

Indeed, a close reading of the Arrow decision underscores the necessity for this determination. Those portions of the

opinion which treat the raison d' tre of the suspension provisions of the Interstate Commerce Act are fully consonant with Petitioners' statements of its legislative history. There is nothing in Arrow to suggest that this legislative policy, intricately formulated over the course of seventeen years and thereafter woven into the Federal Power Act should be subject abrogation by the unilateral action of the Commission which is charged with its enforcement.

The Court in Municipal Light Boards of Reading and Wakefield v. FPC, 450 F.2d 1341(C.A.D.C. 1971), relied upon Arrow, in concluding that the Commission's exercise of discretion in deriving the period of a suspension of rate change is not, however, reviewable. The Court made this observation in the context of an agency's discretion in factual matters, it, however, restated and adhered to the heart of the Leedom decision that agency compliance with statutory parameters is not discretionary:

> We do not speak to a case where the claim is that the suspension action taken or declined by the agency is plainly without any statutory authority or in defiance of a "clear and mandatory" statutory command or reflects an error evident on the face of the papers -- considerations which have been held to constitute an exception, a basis for judicial correction in the case of other types of agency action which Congress has withdrawn from judicial review jurisdiction.

Municipal Light Boards, supra at 1352, citing Leedom

v. Kyne, supra, and its progeny. 1/

Not only did the Commission, in the light of the authorities discussed above, depart from its prior policies which were consistent with legislative intent, it also failed to make findings substantiating the policy change.

In all instances where an agency departs from past statements of policy, it is required that action marking such departure be accompanied by a clear statement of the reasons therefor, so that a reviewing court may determine whether it is consistent with the Congressional delegation of administrative authority. 2/

This requirement was cogently expressed in Atchison, T& S.F. Railway Co. v. Wichita Board of Trade, 412 U.S. 800 (1973):

1/ Cf. Great Western Packers Express, Inc. v. United States, 246 F.Supp. 151(D.Colo.1965), which, not finding agency action in excess of statutorily delegated powers, found Leedom v. Kyne, supra, to be an exception to the general rule expressed in Arrow Transport Co. v. Southern R.Co., supra.

2/ Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167-169(1962); Secretary of Agriculture v. United States, 347 U.S. 826(1954); SEC v. Chenery Corp., 332 U.S. 194(1947).

> There is, then, at least a presumption that those policies [committed to it by Congress] will be carried out best if the settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms. Secretary of Agriculture v. United States, ... The agency may flatly repudiate those norms, deciding, for example, that changed circumstances mean that they are no longer required in order to effectuate congressional policy. Or it may narrow the zone in which some rule will be applied, because it appears that a more discriminating invocation of the rule will best serve congressional policy. Or it may find that, although the rule in general serves useful purposes, peculiarities of the case before it suggest that the rule not be applied in that case. Whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate. 412 U.S. at 808.

In Atchison the Court dealt with the question of the validity of agency action which inexplicably deviated from past practice and with the power of a reviewing court to suspend the operation thereof, pending remand to allow the agency to clearly indicate its justification for such a policy change. The Court affirmed the district court ordered remand, however, it reversed as to its suspension of the agency order. Arrow was not shown to be distinguishable and because no irreparable injury to petitioning party had been demonstrated. It was specifically noted that an injunction of agency orders pending remand would be warranted "if the reviewing court entertained substantial doubt about the consistency of the Commission's action with its mandate from Congress." 412 U.S. at 822. But this is

the eaxt situation presented to this Court by the facts of the instant petition, in further support of which is Leedom v. Kyne, supra. As for the showing of irreparable injury to Petitioners, see J.A. 27-39, 44-65, 87-95. Thus it is clear that judicial review is both necessary and appropriate in the instant proceeding.

III. THE ERROR APPARENT ON THE FACE OF THE COMMISSION'S AUGUST 30, 1974 ORDER, WHICH GROSSLY UNDERSTATED THE RATE OF RETURN WHICH CL&P HAD REQUESTED, NECESSITATES REVIEW BY THIS COURT.

In its order of August 30, 1974 (J.A. 40-43), the Commission stated the rate of return which would be earned by CL&P under its proposed rates as 5.61%. Since CL&P's filing represented the anticipated return as 9.16%, the municipals petitioned for rehearing of that order and cited as one ground the error on the face of the order (J.A. 44). By Order of September 27 (J.A. 66) the Commission acknowledged the error but attributed it to a typographical mistake and further stated that it had not relied on that error in reaching its decision.

The municipals again sought clarfification of the Commission's order (J.A. 87-95). The municipals argued that:

> In contrast with Commission action in cases bearing strong factual similarity to the Connecticut filing, it is clear that the Commission had to have relied on the misstatement of the realized rate of return for Cities as 5.61% instead of 9.16% in declining to grant suspension for the full five-month statutory period. If in fact the Commission's claim of typographical error and Commission awareness of the higher return from Cities when it declined to grant a five-month suspension is correct, the Commission has abused its discretion. The Commission appears to have utilized the one-day suspension tool primarily when the rate increase sought will not provide the Company's claimed rate

of return or no objection to the rate increase has been raised by affected customers 1/ or when a company has demonstrated undue hardsh[illegible] 2/ None of those factors are present here. 3.

Further, because of the crucial nature of this point and the conflicts and contradictions in other areas of the Commission's orders in this proceeding, the municipals pursuant to Section 1.36(2)(c)(5) of the Regulations requested minutes, drafts and other materials pertained to the meeting at which the Commission entered the August 30 Order. (J.A. 95). On November 11 (J.A. 111) augmented by later contacts by telephone and meeting, the Secretary of the Commission or his agent replied that the minutes consisted merely of the final disposition of each matter and all discussion materials, drafts, were nonpublic.

The municipals submit that the refusal of the Commission to open its records to support its suspect statement that the error on the face of the August 30th Order was typographical render that statement of no weight in this proceeding and that therefore the error on the face of the record should be taken to be established , therefore representing an error reviewable by this Court.

1/ See e.g., Superior Water Light & Power Co., E-8953 8/30/74; Puget Sound Power & Light Co., Docket E-8850, 8/1/74; Public Service Co., of Colorado, Docket E-8882,8/30/74.

2/ Alabama Power [illegible] Docket [illegible] 8851, December 12, 1974.

3/ Compare text [illegible] footnotes at pp. 7-8, infra, which suggest that a search for a rationale may be futile, since it appears to be recent Commission policy that the one-day suspension will be the rule and the five-month suspension the exception.

CONCLUSION

WHEREFORE, for the foregoing reasons, the orders of the Federal Power Commission of August 30, September 27, November 8, and November 29, 1974, should be remanded to the Commission with instructions that both of the CL&P fuel clause filings be rejected. Alternatively, these orders, which establish a new Commission policy on rate suspensions, yet contain no findings or reasons in support thereof, should be remanded to the Commission with the instruction that this policy departure be fully explained, and, pending FPC compliance therewith, an injunction should be issued enjoining the use of the CL&P R-2 rate, and either of its fuel clauses.

Respectfully submitted,

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December 13, 1974

OVERCHARGES DUE TO THE MISMATCHING OF R-1 FUEL CLAUSE WITH THE STATIC PORTION OF THE R-2 RATE OCCURRING DURING THE FIVE-MONTH PERIOD REPRESENTING THE MAXIMUM SUSPENSION OF THE R-2 RATE, BASED UPON CL&P DATA PROJECTIONS OF FUEL REVENUES UNDER BOTH R-1 AND R-2 RATES. */

	R-1 Fuel Revenues	R-2 Fuel Revenues	Overcharge Resulting From Use of R-1 Clause With R-2 Rate (Col.1 - Col.2)	Five-Month Customer Total Overcharge	Total Five-Month Overcharge
City of Groton					
Sept. 1974	$ 235,216	$ 188,505	$ 46,711		
Oct. 1974	306,220	247,866	58,354		
Nov. 1974	291,630	237,047	54,583		
Dec. 1974	211,883	170,306	41,577		
Jan. 1975	251,932	202,042	49,890		
				$251,115	
Borough of Jewett City					
Sept. 1974	$ 8,306	$ 6,656	$ 1,650		
Oct. 1974	10,388	8,408	1,980		
Nov. 1974	10,143	8,244	1,899		
Dec. 1974	8,483	6,818	1,665		
Jan. 1975	9,081	7,283	1,798		
				$ 8,992	
Second Taxing District, City of Norwalk					
Sept. 1974	$ 37,384	$ 29,960	$ 7,424		
Oct. 1974	50,569	40,932	9,637		
Nov. 1974	47,741	38,806	8,935		
Dec. 1974	36,100	29,017	7,083		
Jan. 1975	33,528	26,888	6,640		
				$ 39,719	
Third Taxing District, City of Norwalk					
Sept. 1974	$ 24,219	$ 19,410	$ 4,809		
Oct. 1974	26,930	21,798	5,132		
Nov. 1974	30,956	25,162	5,794		
Dec. 1974	22,125	17,783	4,342		
Jan. 1975	28,488	22,846	5,642		
				$ 25,719	

	R-1 Fuel Revenues	R-2 Fuel Revenues	Overcharge Resulting From Use of R-1 Clause With R-2 Rate (Col. 1 - Col. 2)	Five-Month Customer Total Overcharge	Total Five-Month Overcharge
City of Norwich					
Sept. 1974	$126,952	$101,741	$25,211		
Oct. 1974	168,821	136,650	32,171		
Nov. 1974	160,928	130,808	30,120		
Dec. 1974	124,926	100,412	24,514		
Jan. 1975	129,267	103,668	25,599		
				$ 137,615	
Town of Wallingford					
Sept. 1974	$208,282	$166,920	$41,362		
Oct. 1974	269,790	218,378	51,412		
Nov. 1974	254,840	207,143	47,697		
Dec. 1974	193,797	155,769	38,028		
Jan. 1975	192,291	154,211	38,080		
				$ 216,579	
					$ 679,739

*/ Data appearing in columns 1 and 2 taken from "The Connecticut Light and Power Company, Proposed Rate Schedules with Supporting Testimony and Exhibits for Electric Wholesale for Resale Service, Exhibit B-5, August 2, 1974 (FPC Docket No. E-8952).

FUEL ADJUSTMENT OVERCHARGES IMPOSED BY THE CL&P REVISED R-2 FUEL ADJUSTMENT CLAUSE OF SEPT. 30, 1974, FOR THE FIVE-MONTH PERIOD REPRESENTING THE MAXIMUM SUSPENSION OF THE R-2 RATE, BASED UPON CL&P PURCHASED ENERGY DATA PROJECTIONS*/ AND UPON THE INCREASED COST/Kwh WHICH THE COMPANY, IN EXHIBIT I, HAS CONCEDED WOULD BE IMPOSED BY SAID FUEL CLAUSE.

	Purchased Energy (Kwh)	Increased Cost/Kwh	Demonstrated Overcharge	Five-Month Customer Total Overcharge	Total Five-Month Overcharge
City of Groton					
Sept. 1974	27,640,000	$.001042 (actual)	$28,800.00		
Oct. 1974	27,628,000	.001042 (estimate)	28,788.37		
Nov. 1974	25,992,000	.001042 (estimate)	27,083.66		
Dec. 1974	26,652,000	.001042 (estimate)	27,771.38		
Jan. 1975	30,988,000	.001042 (estimate)	32,289.50		
				$144,732.91	
Borough of Jewett City					
Sept. 1974	976,000	$.001042 (actual)	$ 1,016.99		
Oct. 1974	925,000	.001042 (estimate)	963.85		
Nov. 1974	904,000	.001042 (estimate)	941.97		
Dec. 1974	1,067,000	.001042 (estimate)	1,111.81		
Jan. 1975	1,117.000	.001042 (estimate)	1,163.91		
				$ 5,198.53	
Second Taxing District City of Norwalk					
Sept. 1974	4,393,000	$.001042 (actual)	$ 4,577.51		
Oct. 1974	4,503,000	.001042 (estimate)	4,692.13		
Nov. 1974	4,255,000	.001042 (estimate)	4,433.71		
Dec. 1974	4,541,000	.001042 (estimate)	4,731.72		
Jan. 1975	4,124,000	.001042 (estimate)	4,297.21		
				$ 22,732.28	
Third Taxing District, City of Norwalk					
Sept. 1974	2,846,000	$.001042 (actual)	$ 2,965.53		
Oct. 1974	2,398,000	.001042 (estimate)	2,498.72		
Nov. 1974	2,759,000	.001042 (estimate)	2,874.88		
Dec. 1974	2,783,000	.001042 (estimate)	2,899.89		
Jan. 1975	3,504,000	.001042 (estimate)	3,651.17		
				$ 14,890.19	

	Purchased Energy (Kwh)	Increased Cost/Kwh	Demonstrated Overcharge	Five-Month Customer Total Overcharge	Total Five-Month Overcharge
City of Norwich					
Sept. 1974	14,918,000	$.001042 (actual)	$15,544.56		
Oct. 1974	15,033,000	.001042 (estimate)	15,664.39		
Nov. 1974	14,343,000	.001042 (estimate)	14,945.41		
Dec. 1974	15,714,000	.001042 (estimate)	16,373.99		
Jan. 1975	15,900,000	.001042 (estimate)	16,567.80		
				$ 79,096.15	
Town of Wallingford					
Sept. 1974	24,475,000	$.001042 (actual)	$25,502.95		
Oct. 1974	24,024,000	.001042 (estimate)	25,033.01		
Nov. 1974	22,713,000	.001042 (estimate)	23,666.95		
Dec. 1974	24,377,000	.001042 (estimate)	25,400.83		
Jan. 1975	23,652,000	.001042 (estimate)	24,645.38		
				$124,249.12	
					$390,899.18

*/ Data appearing in column 1 taken from "The Connecticut Light and Power Company, Proposed Rate Schedules with Supporting Testimony and Exhibits for Electric Wholesale for Resale Service, Exhibit B-5, August 2, 1974 (FPC Docket No. E-8952).

EXHIBIT C

Wall Street Journal,
Eastern Edition, p. 17
(September 12, 1974).

Quick State Action on Utility Rate Rises Urged by Simon and Other U.S. Officials

By a WALL STREET JOURNAL Staff Reporter

WASHINGTON—Federal energy and financial officials urged state regulators to help bail out financially ailing electric utilities by granting them quick rate increases.

But state utility regulators weren't overly receptive to the proposal, which was made at a conference sponsored by the Treasury Department.

Treasury Secretary William Simon said utilities need rate relief because of steadily increasing costs, mainly for fuel, and to build facilities. Federal Energy Administration Chief John Sawhill and Federal Power Commission Chairman John Nassikas also supported the plan.

Mr. Simon said state utility regulators should allow automatic pass-throughs for power companies' costs and should permit construction work in progress to be used in rate calculations. He said these changes are needed so utilities "can finance their expansion in an orderly fashion and investors will again support the industry."

Utilities recently have complained that high oil prices and other inflationary pressures have created financial problems and hurt their ability to raise capital. Because of these problems, some electric utilities have delayed or canceled significant portions of their construction program. As a partial solution, the House Ways and Means Committee recently voted to increase the investment tax credits for utilities to 7% from 4%, but some utilities want a larger increase.

Several state utility regulators sharply objected to the proposals that they speed electric rate increases. Some say they resented the federal government attempting to make scapegoats of the state regulatory bodies for what they called economic mistakes of the Nixon and Ford administrations.

Bill Bevis, chairman of the Florida Public Service Commission, said further price boosts there would be "an unjust additional burden on consumers. In Florida we have 1.5 million retirees, and they have just about been priced out of the cost of a loaf of bread."

A utility regulator from Montana, Robert McTaggart, said the federal government should take steps to lower interest rates and bring pressure to reduce the high cost of foreign oil to aid the utilities.

William G. Rosenberg, chairman of the Michigan Public Service Commission, complained that much of the increased rates granted by state agencies to utilities are being taken away as federal income taxes. He suggested emergency tax-law changes that would exempt from federal income tax the revenue from whatever rate boosts are needed to bring a utility's equity earnings up to the generally authorized 12%.

The federal officials at the conference didn't comment on the utility industry proposals for the federal government to guarantee new debt financing for utilities.

FPC Chairman Nassikas urged that the investment tax credits for utilities be increased and that there be more widespread use of tax-exempt bonds for pollution-control facilities. He also suggested that the federal government study a tax change that would permit stockholders of electric-utility common stock to choose either a tax-sheltered stock dividend or a taxable cash dividend.

He also recommended that state regulatory commissions study whether they should allow plants under construction to be used in computing rate bases and said the FPC is considering such a move.

The FPC chairman said that, to reduce regulatory lag and improve cash flow for utilities, the agency more frequently has been using rate suspensions of only one day rather than the five months authorized by law for electric-rate increase requests.

Normally, the FPC automatically has suspended rate-increase proposals for several months, often the maximum five-month period, while it considered the merits of the proposal. The agency recently has suspended the increases for only one day, then letting utilities immediately put into effect the higher rates they want, but subject to any refunds the agency may order. Mr. Nassikas suggested that state regulators use the same approach.

PUBLIC POWER WEEKLY

EXHIBIT D

newsletter

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editor BOB CRONIN

No. 74-36 September 13, 1974

FEDERAL OFFICIALS URGE STATE REGULATORS TO 'BAIL OUT' UTILITIES BY RAISING RATES

An imposing array of top-level Ford Administration officials, led by Treasury Secretary William E. Simon , took turns trying to convince the nation's state regulatory commissioners this week that they should "bail out" financially-pinched investor-owned electric utilities by ordering immediate and sizable electric rate increases. . . The regulators were summoned to Washington on short notice for a meeting at the Federal Power Commission, organized and orchestrated by Mr. Simon, who warned that unless the private utilities are given the record-high rate increases they want—in addition to huge new tax writeoffs, tax-free bond options and other subsidies—the nation will be subjected to "brownouts and blackouts." . . . But although most of the assembled state regulators were prevented from presenting their views because of the structured speaking program, a number voiced their dissatisfaction with what they called unprecedented attempts by Federal officials to influence their ratemaking decisions at the state level; and their resentment of efforts by the Administration to make them the victims of the inflationary, economic "blunders" made in Washington. . . They sharply criticized Administration officials for failing to take action to reverse high fuel costs and spiraling interest rates —which they identified as the major causes of the utilities' plight. . . Florida Power Commission chairman William Bevis said that further rate increases—on top of the 30% national average rate boosts allowed in recent months—"would be an unjust additional burden on consumers." . . . The meeting, which was originally to have been closed to the public, was opened up at the last minute because of protests lodged by a number of consumer organizations. . . Richard Morgan of the Environmental Action Foundation provoked an angry response from Mr. Simon when he charged that the meeting was "unfair, improper and illegal" because its objective was to "intervene in the process of state regulation.". . . The consumer spokesman said that instead of raising rates and further subsidizing private utilities, the Administration "should freeze oil, gas and coal prices and end foreign tax credits, oil depletion allowances and other tax subsidies to oil companies.". . . But the top Administration officials selected by former energy czar Simon, like former Federal Reserve governor Andrew Brimmer, scored the failure of state regulators to authorize higher utility rates; Federal Power Commission chairman John Nassikas claimed that five-month suspensions of wholesale power rate increases are now "arbitrary" in urging the state commissioners to follow the FPC's recent example of ordering "instant" increases and adopt "future test year" approaches to ratemaking; Federal Energy Administrator John Sawhill agreed and also urged automatic pass-throughs to consumers of various utility costs in addition to fuel adjustment clauses and said that utilities should be permitted to collect a 15% rate of return; and Assistant Treasury Secretary Frederic Hickman detailed Administration plans, enthusiastically recommended earlier by Mr. Simon, to raise private utilities' tax investment credit benefits from 4% to 7%, and to allow them additional tax subsidies including accelerated depreciation and other tax writeoffs. . . Consumer representative Morgan pointed out that the investor-owned electric utilities are already the beneficiaries of special tax relief measures; that their total Federal tax payments have dropped from 12% of their operating revenues in 1955 to a record low of 2.6% in 1973; and that 49 of the nation's private utilities paid no Federal income tax at all in 1973.

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Sec. 35.14. Fuel cost adjustment clauses. —(a) Fuel adjustment clauses which are not in conformity with the principles set out below are not in the public interest. These regulations contemplate that the filing of proposed rate schedules which embody fuel clauses failing to conform to the following principles may result in suspension of those parts of such rate schedules:

(1) It shall be the intent of the fuel clause to reflect changes in the fuel component (and *fuel only*) per kilowatt hour of delivered energy cost. Where the adjustment does not automatically reflect changes in the system heat rate, the public utility shall make appropriate amendments as significant changes occur in system operations, and at least every five years, and such amendments shall be filed with the Commission in accordance with Sec. 35.13.

(2) The base cost of fuel, which cost shall include no items other than those in Account 151, of the Commission's Uniform System of Accounts for Public Utilities and Licensees, shall be stated in cents per million BTU.

(3) The fuel adjustment shall apply only to that energy supplied from fossil fuel generation.

(b) Any change in the fuel adjustment factor or in the base cost of fuel shall be submitted with supporting data as a filed rate change. [Sec. 35.14(a)(3) as amended by Order No. 421, February 8, 1971 (36 F. R. 3046).]